84-6859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201.
(803) 779-8080

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

I.

IN THIS CAPITAL CASE, DID THE EXCLUSION OF MITIGATING EVIDENCE TENDING TO SHOW THAT PETITIONER WOULD PROBABLY MAKE A FAVORABLE ADJUSTMENT TO PRISON IF HIS LIFE WAS SPARED VIOLATE PETITIONER'S RIGHTS UNDER LOCKETT V. OHIO AND EDDINGS V. OKLAHOMA?

II.

DID THE SOUTH CAROLINA SUPREME COURT'S FAILURE TO APPLY FEDERAL CONSTITUTIONAL STANDARDS TO THE DETERMINATION THAT A TRIAL COURT'S EXCLUSION OF EVIDENCE IN VIOLATION OF LOCKETT V. OHIO COULD BE DISREGARDED AS HARMLESS VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS?

III.

DOES THE SOUTH CAROLINA SUPREME COURT'S CONTINUING DISREGARD OF THIS COURT'S DECISIONS CONCERNING THE SCOPE OF MITIGATING EVIDENCE ADMISSIBLE IN CAPITAL SENTENCING PROCEEDINGS WARRANT REVIEW BY CERTIORARI?

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STATE OF SOUTH CAROLINA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Ronald Deray Skipper prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported as State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985), and is reproduced in the Appendix to this petition at A-1 to A-5. The per curiam order of the Supreme Court of South Carolina dated April 3 , 1985, denying petitioner's timely petition for rehearing is unreported, and is reproduced infra at A-6.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on February 12, 1985. A timely petition for rehearing was denied on April 3, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution

of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code §§16-3-20 et seq. (1984) which provide in pertinent part:

> §16-3-20 (A) A person who is convicted or pleads guilty to murder shall be punished by death or by imprisonment for life . . .
>
> (B) Upon conviction . . . of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or to life imprisonment. . . . In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of punishment. . . .
>
> (C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any . . . statutory aggravating and mitigating circumstances which may be supported by the evidence. . . .

STATEMENT OF THE CASE

As summarized by the South Carolina Supreme Court, the facts of the crime for which petitioner Ronald D. Skipper was convicted and sentenced to death are as follows:

> On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant, telling her friends that they were going to the beach. Later, her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left around 2:00 a.m.
>
> The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 59 (1985).

Following discovery of Ms. Wray's body, witnesses identified petitioner as the person seen kissing her on the beach shortly before her disappearance. He was arrested several days later and charged with her murder. Petitioner pled not guilty and was convicted by a jury of murder and first degree criminal sexual conduct.

Two days after the guilty verdicts were returned, a sentencing hearing was conducted before the trial jury pursuant to the

provisions of S.C. Code §16-3-20 (1984 Cum. Supp.) for the purpose of determining whether petitioner should be sentenced to life imprisonment or to death by electrocution. Immediately before the beginning of the testimony at the sentencing hearing, the trial judge asked defense counsel to specify the statutory mitigating circumstances on which petitioner relied. Counsel responded by stating, among other things, that

> [t]he general mitigating circumstances, of course, will be the biographical life of the defendant, his ability to be rehabilitated. In that regard we have subpoened two jail guards, and Mrs. Carolyn Henry who is a visitor in the jail on a regular basis, and has conferred with the defendant once a week since his confinement.

Counsel conceded at this juncture that certain decisions of the South Carolina Supreme Court had indicated that "the ability of the defendant to adjust to a life sentence or to extended confinement in custody . . . was not relevant."[1] As defense counsel began to explain his position with regard to this evidence, the trial judge interrupted him and stated that he would rule on the admissibility of the evidence at the proper time. State v. Skipper, supra, Transcript of Record (hereinafter cited as "Tr.") at 1000-1001.

The prosecution then proceeded to introduce in aggravation of petitioner's punishment court records and testimony to show that he had been convicted of criminal sexual conduct on several occasions in the past. After this evidence had been received, petitioner was afforded an opportunity to present evidence in mitigation.

The first witness to testify in mitigation was petitioner himself. While most of his testimony concerned his family background and his problems with drugs, he did mention that he had been free of drugs since the beginning of his incarceration nearly eight

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[1]As will be discussed below in greater detail, the primary case to which counsel was referring was State v. Koon, 278 S.C. 578, 298 S.E.2d 769 (1982). In Koon, which was decided about six months before petitioner's trial, the South Carolina Supreme Court upheld the exclusion (by the same trial judge as presided in petitioner's case) of mitigation testimony by a psychiatrist to the effect that the defendant would in all likelihood prove adaptable and nonviolent in prison if given a life sentence. The factual and legal background to this decision is summarized in Patterson v. South Carolina, 53 U.S.L.W. 3736 (1985) (Marshall, J., dissenting from denial of certiorari).

months prior to the trial. He also stated that if he were given a life sentence rather than sentenced to death, he hoped that he would able to work in prison and help support his family. Tr. 1033-1034, 1040. He stated that he had had some disagreements with the jail authorities immediately after his arrest over his right to make phone calls and to have his personal belongings, but that after this initial period he had gotten along well with the custodial staff at the jail. Tr. 1035-1036. The prosecutor's cross-examination of petitioner ended with the following exchange:

> Q. You are the fellow that when you got to the Horry County jail went to kicking the cell, right?
>
> A. Yes, sir.
>
> Q. That's you. That's the kind of fellow you are, but you are nice today, right?
>
> A. (No response).
>
> MR. DUNN (prosecuting attorney): I have no further questions.

Tr. 1065-1066.

Petitioner's next witness in mitigation was his ex-wife, Pamela Anderson Skipper. Mrs. Skipper described petitioner as the product of a violent and turbulent home life, and related a history of drug and alcohol dependence and emotional disturbance. She also related that petitioner suffered from nightmares which were the aftermath of his having been repeatedly raped in prison while serving a Youthful Offender sentence for statutory rape. Tr. 1073-1074. Later in her testimony she recounted petitioner's efforts to seek treatment for his psychiatric problems. Mrs. Skipper described petitioner as having been "upset" when he was first arrested for Ms. Wray's murder, and she recounted her unsuccessful efforts to visit him early in his incarceration. At this juncture, the following exchange occurred:

> Q. [by Mr. Dusenbury, defense counsel]: Now, since that period when you and Ronny were upset, I ask you whether or not what type of adjustment he made to prison life?
>
> A. He has made a good adjustment.
>
> Q. What is your opinion as to whether or not he could be---

MR. DUNN: Object to, "What is your opinion." It can't be relevant. She is not qualified as an expert of any kind.

THE COURT: Mr. Dusenbury?

MR. DUSENBURY: I think she is well qualified

THE COURT: Let's hear the rest of your question and then I will decide.

Q. What is your opinion from your knowledge of Ronny and his reaction to authority under the present conditions, and under prison conditions over an extended period of time: what is your opinion as to whether he could make a good adjustment?

THE COURT: Objection sustained.

MR. DUSENBURY: Your Honor, we would like to take up a matter of law outside the presence of the jury.

THE COURT: I refer you to the case of State against Koon. I am familiar with the law. . . .

(The following took place outside the presence of the jury.)

THE COURT: In the case of State versus Koon it says, "Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence [or] nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life."

MR. DUSENBURY: Your Honor, we have under subpoena two jailers, Mr. Fritz Collins, Mr. Ronny Johnson, and a regular visitor Carolyn Henry to testify that the defendant has made a good adjustment.

THE COURT. Whether he can or cannot, State versus Koon says it is not an issue in this case.

MR. DUSENBURY: Even if they state after this initial period he has made a good adjustment?

THE COURT: Read State versus Koon. That is not an issue, whether he can adjust or not adjust.

MR. DUSENBURY: So none of these witness[es] will be permitted to testify?

THE COURT: I don't know what they are going to say, but I am telling you they will not be permitted to testify about his adjustability to prison life.

MR. DUSENBURY: That is the only thing we would offer them for. Thank you, Your Honor.

THE COURT: Anything further?

MR. DUSENBURY: No, sir.

THE COURT: Give us the jury, please.

Tr. 1095-1098.

After this ruling excluding the testimony of the jail guards and of Mrs. Henry, petitioner called as mitigation witnesses his mother, sister and one additional family member. Their testimony consisted largely of descriptions of petitioner's traumatic childhood and adolescence in a home environment dominated by alcoholism and continuous domestic violence. None of these witnesses gave any testimony concerning petitioner's conduct in jail during the preceding eight months, although petitioner's mother did state, as had petitioner, that he had been free of drugs since the start of his pretrial confinement. Tr. 1148. During the testimony of another family member, Mrs. Hazel F. Oliver, petitioner's counsel acknowledged that the trial judge had "already ruled on adjustment," and when the trial judge confirmed this, counsel concluded his examination without asking the witness any questions concerning petitioner's adjustment to prison. Tr. 1120. After these witnesses had testified, petitioner rested his case in mitigation.

In sum, the result of the trial judge's ruling excluding the testimony of the two jail officers and Mrs. Henry, petitioner's jail visitor, was that no favorable testimony concerning petitioner's conduct or adjustment in jail was introduced on his behalf, with the exception of the testimony of petitioner's ex-wife and of petitioner himself. In his argument to the jury--knowing perfectly well that the trial judge had excluded three impartial witnesses from testifying on petitioner's behalf concerning his adjustment to confinement--the prosecutor made the following statement:

> What kind of fellow is he? He told you, not me, something about an unlawful weapon. He was the lookout man in a stealing case when he was very young. Been in trouble all his life in some way or other. His wife said he told her -- I didn't hear anybody else say it. He told her . . . that he had been raped in prison. With his history and what you know about him, who do you think the raper was and who do you think the rapee was? And if given the opportunity again with this four time sexual abusing loser, who do you think will get raped in prison? Will it be Ronald Skipper, big old Ronald Skipper who knocks woman [sic] in the side of the head, or will it be some little boy in prison?

Tr. 1201-1202. Later in his argument, while reviewing the list of mitigating circumstances submitted by petitioner for the

jury's consideration, the prosecutor noted that petitioner claimed to have "'shown significant and positive adjustments to confinement, and education and employment skills that enable him to be a stable and productive prisoner.'" The prosecutor responded to this assertion by recalling the one instance of petitioner's bad conduct in pretrial confinement to which he had admitted on cross-examination, and suggested that this incident revealed petitioner's likely future conduct in prison:

> Didn't he admit kicking on the bars over there? That's the kind of prisoner he is. Kicking on the bar. Kicking on the bars. . .

Tr. 1213. After hearing arguments of counsel and the judge's sentencing charge, the jury deliberated about ninety minutes before returning a binding recommendation of death.

On appeal to the South Carolina Supreme Court, petitioner alleged, inter alia, that the trial court's exclusion of the mitigation testimony of the jail guards and of Mrs. Henry concerning petitioner's good adjustment to confinement during the eight months between his arrest and his trial violated the Eighth Amendment principle enunciated in Lockett v. Ohio, 438 U.S. 586 (1978). Brief of Appellant at 54-57. The South Carolina Supreme Court rejected this argument, and affirmed petitioner's convictions and death sentence. The state supreme court's response to his Lockett argument, in its entirety, consisted of the following:

> Next, Appellant charges error in the refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.
>
> The trial judge properly refused to admit evidence of Appellant's future adaptability to prison life. State v. Koon, [278 S.C. 578, 298 S.E.2d 769 (1982)]. However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 61-62 (1985)

Petitioner's timely petition for rehearing was denied without opinion by the South Carolina Supreme Court on April 3, 1985. On April 9, the state supreme court granted a stay of execution in order to permit the filing and disposition of this petition for a writ of certiorari.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

As set forth in the preceding statement, petitioner attempted unsuccessfully to present to the sentencing jury the testimony of two jail officers and a regular jail visitor to show his good conduct and adjustment to confinement over an extended period of time. He assigned the exclusion of this evidence as error on appeal in the South Carolina Supreme Court, State v. Skipper, ___ S.C. ___, 328 S.E.2d 58 (1985), Exception No. 16, Tr. 1324, and alleged that the actions of the trial judge violated petitioner's Eighth Amendment rights under Lockett v. Ohio, 438 U.S. 586 (1978).[2] The South Carolina Supreme Court denied his Lockett claim on the merits. Relying on its prior decision in State v. Koon, supra, the state supreme court held that petitioner's future adaptability to prison life was irrelevant to the jury's sentencing decision. While implicitly recognizing that the exclusion of the jail officers' and visitor's testimony was error to the extent that the excluded testimony bore on his past record of good conduct, see State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), cert. denied, 53 U.S.L.W. 3736 (April 15, 1985); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984), the court held that the death sentence could stand because petitioner's jail record had been presented to the jury by his own testimony and that of his sister and mother. State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 61-62 (1985).

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[2]The fact that petitioner's counsel did not specify a constitutional basis for his proffer of the excluded evidence at trial is of no consequence, since the South Carolina Supreme Court does not recognize procedural forfeiture in capital cases, and considers all trial errors in favorem vitae regardless of whether they were timely raised at trial or even on appeal. State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979) (reversing death sentence due to improper prosecution argument; no objection at trial or on appeal); State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1981) (reversing conviction due to improper cross-examination; no objection at trial); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (same); State v. (James) Butler, 277 S.C. 452, 290 S.E.2d 412 (1982) (improper prosecution jury argument on guilt and punishment; no objection at trial); State v. Norris, Opinion No. 22264 (S.C., March 25, 1985) (erroneous instructions on parole eligibility; no objection at trial).

WHY THE WRIT SHOULD BE GRANTED

1. South Carolina's continuing deviation from Lockett.

Over the past year, the South Carolina Supreme Court has upheld a series of death sentences despite their having been imposed in plain violation of this Court's holding in Lockett v. Ohio, 438 U.S. 586 (1978) that

> the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original); Eddings v. Oklahoma, 455 U.S. 104 (1982). Two members of this Court have recently expressed the view that this pattern of Lockett errors is such as to merit the intervention of the Court in the exercise of its certiorari jurisdiction. Patterson v. South Carolina and Koon v. South Carolina, 53 U.S.L.W. 3736 (April 15, 1985) (Marshall and Brennan, JJ., dissenting from denial or certiorari). It has now become apparent that the South Carolina Supreme Court's decisions in Patterson and Koon were not minor or isolated instances of a departure from Lockett, but signify a continuing and deepening divergence between the administration of the death penalty in South Carolina and the constitutional commands of this Court's precedents.

As noted in the dissenting opinion in Patterson, the genesis of the current series of Lockett violations was the South Carolina Supreme Court's holding in State v. Koon, 278 S.C. 578, 298 S.E.2d 769 (1982) (Koon I). The pertinent portion of Koon I--most of which was read to defense counsel by the trial judge in ruling upon his evidentiary proffer at petitioner's trial--is the following:

> Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence or nonexistence of mitigating or aggravating circumstances, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. In Lockett v. Ohio, cited as controlling in Eddings v. Oklahoma, the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appel-

lant's future conformity to prison life was properly excluded as irrelevant.

Id., 298 S.E.2d at 773-774.

In a number of cases tried after Koon I, including this one, South Carolina trial judges applied this language from Koon I to exclude not only evidence of capital defendants' probable future good behavior in prison, see State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13 1984), cert. denied, 105 S.Ct 1878 (1985), but also evidence bearing on defendants' actual past record of good behavior while incarcerated. State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985), State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, 53 U.S.L.W. 3736 (April 15, 1985); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984). These evidentiary rulings continued to be made for nearly a year after petitioner's trial until, in State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), cert. denied, 53 U.S.L.W. 3736 (April 15, 1985) (Koon II), the South Carolina Supreme Court modified its prior decision in Koon I by holding a defendant's prior prison record to be admissible as general evidence of his character.

Koon II did not, however, modify the South Carolina Supreme Court's view first stated in Koon I that a defendant's likely future behavior in prison is an irrelevant consideration for capital sentencing, and that psychiatric and other evidence relating to a defendant's future nondangerousness in prison is inadmissible. Apparently for this reason, the court has declined to reverse any death sentence because of the erroneous exclusion of evidence of a defendant's record of good conduct in prison so long as some evidence of the defendant's good character was admitted. Thus, in State v. Patterson, supra, the court upheld a death sentence despite the erroneous exclusion of the testimony of three prison guards and a psychiatrist on the grounds that the excluded testimony concerning the defendant's excellent prison record would have been "cumulative" to general character testimony of three family members, a former employer, and a neighbor and a minister who had both known the defendant as a child. Similarly, in State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985), the

court held the erroneous exclusion of the testimony of three prison guards concerning the defendant's prison record and rehabilitative potential to have been "harmless beyond a reasonable doubt" because the jury was permitted to hear general character testimony from the defendant's mother and four older sisters. In Elmore, the court cited its opinion in the present case as authority for its conclusion that the officers' testimony was legally irrelevant and properly excluded to the extent that it bore on his "rehabilitative characteristics." However, the court found the exclusion of the officers' testimony concerning his past behavior and character to have been error, albeit harmless. It went on to explain the analysis which had led to its conclusion that the error did not require reversal of the death sentence.

> At trial, appellant's mother and four sisters testified as to his character. They testified that he was a good boy who never got into trouble. One sister testified that he was not violent, and another stated he could not have committed the murder "unless his mind snapped."
>
> Appellant contends our prior findings of harmless error beyond a reasonable doubt were predicated on a showing that other testimony described a defendant's prison conduct. Such reliance is misplaced. While our earlier cases may be factually distinguished, they are based upon a simple proposition -- whether a defendant had an ample opportunity to present nonstatutory mitigating circumstances.
>
> It is clear appellant presented a sufficient amount of testimony in mitigation; therefore, error in excluding the proffered testimony was harmless beyond a reasonable doubt.

Id.

This passage from State v. Elmore reveals the patently unconstitutional nature of the South Carolina Supreme Court's mode of analysis of the Lockett violations involved in this case. The error which the state supreme court committed here has two components. First, the court's repeated insistence that a capital defendant's adaptability and likely future good conduct in prison is irrelevant as a matter of law is in direct conflict with this Court's death penalty decisions from Woodson v. North Carolina, 428 U.S. 280 (1976) and Jurek v. Texas, 428 U.S. 262 (1976) through Lockett v. Ohio, supra, and Eddings v. Oklahoma, 455 U.S. 104 (1982), to Barefoot v. Estelle, 463 U.S. 880 (1983) and

California v. Ramos, 463 U.S. 992 (1983). Secondly, the South Carolina Supreme Court's expressed determination to treat the erroneous exclusion of whole categories of relevant and admissible mitigating evidence as "harmless" so long as the defendant was allowed to present any sort of mitigating evidence at all is irreconcilable both with this Court's repeated insistence upon the need for particular care and accuracy in capital sentencing decisions, Woodson v. North Carolina, supra at 304-305, Gardner v. Florida, 430 U.S. 349, 357-358 (1977), Beck v. Alabama, 447 U.S. 625, 637-638 (1980) and with long-established principles governing the determination that a given federal constitutional error may be disregarded as harmless. Chapman v. California, 386 U.S. 18 (1967).

2. The South Carolina Supreme Court's prohibition of evidence of a defendant's future adaptability to prison plainly violates the Eighth Amendment principle of Lockett v. Ohio.

For a jury charged with deciding whether a particular defendant should be executed or committed to prison for life, the relevance of his actual conduct in jail over a substantial period of time immediately preceding his sentencing hearing is self-evident, both for the light which this conduct sheds on his character, and for the bearing which the defendant's prison record may have on the likelihood of his committing violent or unlawful acts in the future. See, gen., Barefoot v. Estelle, supra, California v. Ramos, supra. That such predictions play an important role in capital sentencing decisions has been frequently recognized. Barefoot v. Estelle, supra, Estelle v. Smith, 451 U.S. 454 (1981); and see Eddings v. Oklahoma, 455 U.S. 104, 121 (1982) (Burger, C.J., dissenting). To be sure, South Carolina law does permit the prosecution to introduce psychiatric predictions of capital defendants' likely future dangerousness. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, 103 S.Ct. 3572 (1983). Thus South Carolina's refusal to permit a jury to consider evidence bearing on capital defendant's probable nondangerousness in a prison environment is based not on any concern for the

accuracy or reliability of such determinations, cf. People v. Murtishaw, 29 Cal.3d 733, 175 Cal. Rptr. 738, 631 P.2d 446 (1982), but rather on its view that a convicted murderer's likely good conduct in prison is itself irrelevant to the jury's sentencing decision. Koon I, supra, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, 104 S.Ct. 3560 (1984), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984). As noted above, the South Carolina Supreme Court has reached this conclusion on the basis of its reasoning that a capital sentencing jury is concerned with the characteristics of the defendant only "as they bear logical relevance to the crime" for which he has been convicted. Koon I, supra According to the South Carolina court, a capital defendant's potential for a successful adjustment to life in prison is irrelevant to the determination of his sentence because of "the lack of logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." State v. Plath, supra, 313 S.E.2d at 627.

What the South Carolina Supreme Court's unduly narrow and crime-focused view of relevancy overlooks is the possibility that a sentencing jury's perception of whether a convicted murderer would pose an unreasonable risk of further acts of violence if permitted to live in prison might reasonably influence its decision to take or spare his life. A convicted murderer's probable future conduct is an entirely proper consideration in any sentencing decision, California v. Ramos, supra, and where the jury's choice is between death and life imprisonment, the likelihood that a particular defendant would prove co-operative and nonviolent in a prison environment is especially germane. Thus the South Carolina Supreme Court's prohibition of such evidence--at least where the evidence is favorable to the defendant, cf. State v. Woomer, supra--cannot be reconciled with the command of the Eighth Amendment that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428

U.S. 262, 271 (1976). In sum, it is obvious that South Carolina's prohibition of testimony concerning a capital defendant's probable good conduct in prison violates the Eighth Amendment holdings of this Court. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

3. The South Carolina Supreme Court's assessment of the effect of the Lockett errors in this case.

For the reasons set forth above, the state court's analysis of the Lockett issue in this case was controlled by a legal principle--Koon I's prohibition of evidence of a convicted murderer's probable good conduct in prison--which is itself violative of Lockett. For this reason, the South Carolina Supreme Court failed to identify correctly the Lockett errors which actually occurred here. While the state supreme court did not disagree with petitioner's claim that his three jail witnesses were erroneously barred from testifying, it implicitly adhered to its line of cases holding that such evidence is admissible only to show general good character rather than to establish the likely future conduct of a capital defendant in prison. State v. Elmore, supra.

Moreover, having created an artificial and constitutionally untenable distinction between evidence of petitioner's past good record in jail and evidence tending to prove his likely future good conduct in prison, the state supreme court compounded its error by its cursory treatment of whether his past good conduct had been adequately established. The state supreme court's consideration of this question comes nowhere near to the "thorough inquiry" required by federal constitutional standards of harmless error review. Francis v. Franklin, 53 U.S.L.W. 4495, 4500 n.10 (U.S., April 29, 1985). The state court correctly noted that petitioner himself and his ex-wife were permitted to give favorable characterizations of petitioner's conduct in jail. But the bias of these witnesses was self-evident, and the jury might well have

given little or no weight to their testimony on this point.[3] Moreover, petitioner's own testimony was undermined by the prosecutor's cross-examination concerning one incident of misbehavior at the beginning of his incarceration. The state court gave no consideration to the possible effect of the prosecutor's impassioned claims in his summation that petitioner would probably rape other inmates if sentenced to prison, and that his one act of misbehavior in jail should be taken as an accurate guide to his likely behavior in prison. Nor does the court appear to have considered the fundamental unfairness, in the face of these predictions by the prosecution, of the trial judge's refusal to permit petitioner to call as witnesses neutral and impartial jail officials who could have rebutted the state's assertions by establishing that petitioner's conduct in jail over a long period of pretrial detention had actually been good. See Green v. Georgia, 442 U.S. 95 (1979). Under these circumstances, it is simply untenable to suggest, as did the South Carolina Supreme Court, that the exclusion of the testimony of petitioner's jail witnesses could have made no difference because the jury was permitted to hear petitioner's self-serving testimony addressed to the same point, along with that of his ex-wife.

In summary, the excluded testimony would have permitted petitioner to attempt to persuade the jury, through the well-grounded and impartial testimony of two law enforcement witnesses and of a regular visitor not related to petitioner, that he could be allowed to live in prison without any undue risk of further acts of violence. What the jury heard instead were a petitioner's own self-serving opinion, and a single conclusory statement by his ex-wife, who was testifying on the basis of little or no direct knowledge of petitioner's actual behavior in jail. Thus even if the state supreme court were correct in its often-repeated view that this entire subject was relevant only as it bore on a capital

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[3]The court's statement that appellant's mother also testified to his past adaptability to prison appears to be wholly unsupported by the record, except insofar as she stated that he had been off drugs since his arrest. Tr. 1148.

defendant's general character and not as evidence of his future conduct in prison, it is apparent that the court's conclusion that petitioner's past prison conduct was adequately established by other testimony so as to render harmless the exclusion of the three jail witnesses is not supported by the record, and does not reflect compliance with any recognizable federal constitutional standard of harmless-error review.

4. The need for a standard by which to assess "harmlessness" of violations of Lockett v. Ohio.

To the extent that the South Carolina Supreme Court recognized the presence of any error at all in the trial judge's exclusion of petitioner's jail witnesses, it treated the matter as a mere state law evidentiary error, and neither considered nor applied any federal constitutional standard to its determination of whether the error could be disregarded as harmless. Because this Court has not yet expressly considered the interrelation between Lockett and the "harmless constitutional error" doctrine of Chapman v. California, 386 U.S. 18 (1967), petitioner submits that this case provides an appropriate occasion to consider this important question.

In Chapman v. California, supra, the Court held that, with certain exceptions, constitutional error could be disregarded as harmless so long as the state, as beneficiary of the error, was able "to prove beyond a reasonable doubt that the error complained did not contribute to the verdict obtained." 386 U.S. at 24. However, the Court cautioned that this federal harmless constitutional error rule would not permit courts "to treat as harmless those constitutional errors that 'affect substantial rights' of a party," id. at 23, quoting Fahy v. Connecticut, 375 U.S. 85 (1963). Accord, Harrington v. California, 395 U.S. 250, 254 (1969) ("We do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error.").

As an initial matter, it is plain that the importance of the objectives which the rule of Lockett v. Ohio seeks to safeguard

requires that no lesser standard than that of Chapman v. California be applied to assess whether actual Lockett violations may be disregarded as harmless. As this Court has held on many occasions since Gregg v. Georgia, 428 U.S. 153 (1976), the severity and irrevocability of death as punishment creates a special need for particular reliability in the decision to impose a death sentence in a particular case, Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and renders unconstitutional any procedure which creates an unnecessary risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Given the gravity of the sentencing decision and the "vital importance to the defendant and to the community" that capital sentencing decisions "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 356, 358 (1977), it is plain that any standard of appellate review less demanding than that prescribed by Chapman will be inadequate to the task of "ensur[ing] that the death penalty was not erroneously imposed" as a consequence of constitutional error. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See also, Gardner v. Florida, 430 U.S. 356, 362 (1977); Zant v. Stephens, 462 U.S. 862, 885 (1983).

In view of the nature of the Eighth Amendment interests protected by Lockett, it is clear that if any violations of that rule may be tolerated at all, they must at the very least satisfy the rigorous scrutiny mandated by Chapman. This leads to the question of whether and how Chapman may be applied to Lockett violations.

In answering this question, it is essential to keep in mind the fundamental difference between the nature of the jury's decision with respect to a criminal defendant's guilt or innocence and its task of determining whether or not to impose a sentence of death. Zant v. Stephens, supra, 103 S.Ct. at 2754-2755 (1983) (Rehnquist, J., concurring). In any criminal trial, the jury is required to convict a defendant once it finds that the evidence

has demonstrated his guilt beyond a reasonable doubt. It is for this reason that an examination of the record will usually reveal whether "there is a reasonable possibility that the [constitutional error] contributed to the verdict." Schneble v. Florida, 405 U.S. 427, 432 (1972). But under South Carolina's death penalty sentencing statutory complex, the discretionary and relatively unstructured nature of the jury's sentencing decision makes such a determination virtually impossible. No quantum of evidence may ever suffice to require a jury to impose a death sentence. Woodson v. North Carolina, 428 U.S. 280 (1976), State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). South Carolina juries are not required to state their reasons for declining to impose a sentence of death, S.C. Code §16-3-20(C) (1983 Cum. Supp.), and may impose a life sentence on the basis of any aspect of the case which it sees fit to consider. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63, 74 (1982), cert. denied, 460 U.S. 1103 (1983). Like the Georgia sentencing scheme considered in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, supra, South Carolina's sentencing procedure does not require the jury to balance aggravating and mitigating factors against one another, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 629, cert. denied, 104 S.Ct. 3560 (1984), but consigns the ultimate sentencing decision to the jury's unfettered discretion once one or more statutory aggravating circumstances have been established. The jury's sentencing recommendation is binding upon the trial judge, State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802, cert. denied, 444 U.S. 957 (1979), and while the sufficiency of the evidence to support a death sentence is reviewed on appeal by the state supreme court, S.C. Code §16-3-25(C) (1983 Cum. Supp.), that court does not undertake to redetermine or reweigh the factors underlying the jury's sentencing recommendation, so long as that recommendation is supported by any reasonable view of the evidence. See e.g., State v. Adams, 279 S.C. 228, 306 S.E.2d 208, cert. denied, 104 S.Ct. 558 (1983) ("the jury had ample opportunity to weigh all of the evidence as might relate to mitigating circumstances").

Thus, because the jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment," California v. Ramos, supra, 103 S.Ct. at 3456 (1983), any attempt to identify whether constitutional error in the exclusion of relevant mitigating evidence from a capital sentencing proceeding may have contributed to the sentencing verdict is fraught with insurmountable difficulties. Other states have implicitly recognized the virtual impossibility of determining the effect of such error by reversing death sentences so infected without consideration of prejudice. See, e.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979) (exclusion of testimony of defendant's wife was reversible error even though evidence was somewhat cumulative, "because of the unlimited and undefined nature of mitigating evidence"); Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983); Simmons v. State, 491 So.2d 316, 320 (Fla. 1982) (exclusion of psychiatric evaluation of defendant's capacity for rehabilitation); Miller v. State, 332 So.2d 65 (Fla. 1976) (denial of continuance to permit psychiatric testimony in mitigation). While these decisions appear to rest on state law, they accurately reflect the difficulty of determining whether the jury's sentencing decision would necessarily have been the same had all relevant mitigating evidence been considered.

This is not to say that any exclusion of mitigating evidence must necessarily trigger reversal under Lockett. Obviously, the federal constitution does not limit the authority of state trial courts to exclude evidence which is truly cumulative, in the sense that it duplicates other evidence of the same kind proving the same point. Purcell Envelope Co. v. United States, 48 Ct.Cl. 66, 73 (1913); McCabe v. Saxon, 184 S.C. 158, 191 S.E. 905 (1937). Thus, for example, if the trial court had admitted the testimony of the three jail witnesses proffered by petitioner, Lockett would not have been violated by the exclusion of the identical testimony of a fourth or fifth such witness. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 71 (1979) (Lockett and state law do "not imply. . . that the judge, in his discretion

and inherent power to control the progress of trials, cannot limit the introduction of an endless quantity of cumulative testimony . . ."); and see Brooks v. Francis, 716 F.2d 780, 791-792 (11th Cir. 1983) (no Lockett violations where mitigation witnesses were ultimately permitted to give the testimony for which they were called, despite frequent objections by prosecution).

These elementary principles of trial procedure, however, have nothing to do with harmless error, for where only genuinely cumulative testimony is excluded, the trial court has not committed any error at all. The question presented by this case is entirely different. Here, an entire category of witnesses were erroneously excluded. No genuinely comparable evidence was presented to or considered by the jury, and the prosecution took advantage of the exclusion of petitioner's mitigating evidence to imply that petitioner's jail record had actually been bad, and that he would probably prove an ill-behaved and dangerous prison inmate if given a life sentence. Under such circumstances, a reviewing court simply cannot conclude, with the certainty that the Eighth and Fourteenth Amendment require, that the jury's sentencing verdict would have necessarily been the same had all the facts been revealed at trial. The record does not and cannot exclude the possibility that petitioner's death sentence was imposed in part because the jury feared that imposition of a life sentence would provide insufficient protection to society against the impulsive violence which petitioner had manifested in the various crimes of which he had been convicted, and in his misconduct at the jail immediately after his arrest.[4] Testimony from jail

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[4]The importance of such considerations in the decision to impose the death penalty cannot be underestimated. A recent national public opinion survey concerning attitudes toward capital punishment reveals that Americans' most frequently-cited justification for the death penalty was the incapacitation of the convicted murderer himself, and the elimination of any danger that he might kill again. L. Kilman, "Penalty--Deter, Protect Society, Most Say," Associated Press, Jan. 29, 1985. While such considerations are undeniably proper and relevant in any capital sentencing proceeding, see, e.g., Jurek v. Texas, 428 U.S. 262, 274-276 (1976), Coker v. Georgia, 433 U.S. 584, 605-606 (1977) (Burger, C.J., dissenting), it is equally plain that a defendant must be allowed a fair opportunity to demonstrate that, in his individual case, society could be adequately protected by imposition of a life sentence rather than death.

officials who had had daily contact with petitioner for the nearly eight months prior to his trial, and a regular jail visitor who had met with him every week, might have gone far towards allaying such concerns. Accordingly, it is plain that the trial judge's exclusion of relevant and competent mitigating evidence created a situation in this case in which "the jury was told all the reasons why the death sentence should be imposed but only some of the reasons why it should not." Smith v. Estelle, 445 F. Supp. 647, 659 (N.D. Tex. 1978), aff'd on other grounds, 451 U.S. 454 (1981).

5. The need for review by this Court.

As noted earlier in this petition, the present case constitutes one of a lengthening series of capital decisions in which the South Carolina Supreme Court has developed and enforced a plainly erroneous restriction on the admission of relevant mitigating evidence. State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, 53 U.S.L.W. 2726 (April 15, 1985), State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), cert. denied, 53 U.S.L.W. 2726 (April 15, 1985), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984), cert. denied, 105 S.Ct 1878 (1985), State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985). In addition, these cases demonstrate a mode of appellate review of Lockett violations which, if permitted to continue, will effectively vitiate the constitutional protection which Lockett and Eddings were intended to afford to capital defendants. South Carolina's firmly-established practice of affirming death sentences marred by plain Lockett error so long as some sort of general character evidence was admitted in mitigation also places the South Carolina Supreme Court in conflict with the state supreme courts of Georgia and Florida, which have implicitly acknowledged the impossibility of attempting to gauge the effect on a sentencing jury of erroneous exclusions of mitigating evidence. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979), Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983) Simmons v. State, 491 So.2d 316, 320 (Fla. 1982), Miller v. State, 332 So.2d 65

(Fla. 1976). For all of these reasons, the Court should grant the writ of certiorari to consider the constitutionality of South Carolina's restrictions on the scope of evidence admissible in mitigation in capital cases, as well as the application of the Chapman harmless constitutional error doctrine to violations of the Eighth Amendment principle of Lockett v. Ohio.

CONCLUSION

The writ should be granted.

Respectfully submitted,

David I. Bruck
DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201
(803) 779-8080

ATTORNEY FOR THE PETITIONER.

June 3, 1985.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

A P P E N D I X

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201.
(803) 779-8080

ATTORNEY FOR PETITIONER

The STATE, Respondent,

v.

Ronald DeRay SKIPPER, Appellant.

No. 22234.

Supreme Court of South Carolina.

Feb. 12, 1985.

Defendant was convicted in the General Sessions Court, Horry County, Marion H. Kinon, J., of murder and first-degree criminal sexual conduct and he appealed. The appeal was consolidated with mandatory review of the defendant's death sentence. The Supreme Court, Chandler, J., held that: (1) there was no systematic exclusion of jurors; (2) excusal for cause of two jurors was proper; (3) there was no improper ex parte communication when the trial judge requested legal authorities on points of law from the State's attorney; (4) the circumstances of a prior rape were admissible during the sentencing phase of the trial in reference to the characteristics of the defendant; (5) the solicitor's final argument during the sentencing phase was not an improper appeal to the passion and prejudice of the jury; (6) where the alleged statutory aggravating circumstance of rape was established in the guilt phase of the trial, the defendant was not prejudiced by the failure to give a limiting instruction that details of prior convictions could only be considered as evidence of his characteristics; and (7) the death sentence was not excessive or disproportionate.

Affirmed.

1. Jury ⇐33(1.2, 1.4)

Statute providing optional jury service to practicing physicians, lawyers, men and women over 65 and others did not systematically exclude or disqualify any category of citizens; rather, statute granted option which juror alone could exercise. Code 1976, § 14-7-850.

2. Jury ⇐40

Excusal for cause of juror who advised trial judge that she was nervous because of her awareness of defendant's prior convictions, whose mother advised judge of juror's serious medical problems, who appeared to be in somewhat of a stupor, whose speech was slurred and whose eyes fluttered and were closed during part of her testimony on voir dire was proper.

3. Jury ⇐108

Juror was properly excused for cause where she stated categorically that she could not vote to impose the death penalty, even though isolated portion of her testimony on voir dire indicated that she might agree to death penalty under certain circumstances.

4. Criminal Law ⇐867

Communication between trial judge and State's attorney during jury deliberations was not improper ex parte communication so as to entitle defendant to mistrial where there was no substantive discussion of defendant's trial, but rather, trial judge requested legal authorities on points of law.

5. Criminal Law ⇐986.6(3)

In sentencing phase of capital case, it is essential that jury have for consideration all pertinent information about defendant on trial for his life.

6. Homicide ⇐354

Evidence of nonstatutory aggravating circumstances is admissible in sentencing phase of capital murder trial.

7. Homicide ⇐354

In sentencing phase of prosecution for murder and first-degree criminal sexual conduct which resulted in death sentence, evidence of circumstances of prior rape of State's witness was admissible, but only with respect to characteristics of defendant.

8. Homicide ⇐354

In sentencing phase of prosecution for murder and first-degree criminal sexual conduct which resulted in death sentence,

trial judge properly refused to admit evidence of defendant's future adaptability to prison life.

9. Criminal Law ⇐699, 1154

Propriety of jury argument rests in sound discretion of trial judge and, absent abuse amounting to error of law, will not be disturbed.

10. Criminal Law ⇐723(1)

State's attorney's final argument during sentencing phase of prosecution for murder and first-degree criminal sexual conduct which resulted in death sentence did not amount to improper appeal to passion and prejudice.

11. Homicide ⇐341

Where [illegible]'s alleged statutory aggravating circumstance was established in guilt phase of capital murder prosecution by defendant's conviction of rape, no prejudice resulted to defendant from failure to give limiting charge to jury that details of prior conviction could be considered only as evidence of defendant's characteristics and not as proof of aggravating circumstance of rape.

12. Homicide ⇐311

Where defendant has not been convicted in guilt phase of capital murder prosecution of crime relied on by state as statutory aggravating circumstances, limiting instruction must be given that details of prior convictions could be considered only as evidence of his characteristics and not as proof of statutory aggravating circumstance.

13. Homicide ⇐354

Death sentence upon conviction for murder and first-degree criminal sexual conduct was not excessive or disproportionate to offenses. Code 1976, § 16-3-25(C)(3).

Richard G. Dusenbury, Florence, and South Carolina Office of Appellate Defense, Columbia, for appellant.

Atty. Gen. T. Travis Medlock, Asst. Attys. Gen. Harold M. Coombs, Jr., and Charles H. R[illegible]ardson, Columbia, and Sol. James O. Du[illegible], Conway, for respondent.

CHANDLER, Justice:

Appellant was convicted of murder and first degree criminal sexual conduct (rape), and sentenced to death and thirty years imprisonment.

We consolidate his appeal and our mandatory review of the death sentence, and affirm.

FACTS

On the evening of November 1, 1982, Maryanne Wray (victim) went with two friends to the Rainy Day Inn in Garden City. Around 11:00 p.m. she left with Appellant, telling her friends that they were going to the beach. Later her friends saw Appellant and the victim on the beach, embracing. When she did not return to the Inn, the friends left at 2:00 a.m.

The victim's body was found the next morning at a house near the Garden City pier; she had been strangled.

Appellant was arrested on November 2 and, on the basis of a photographic and live lineup, charged with the crimes.

ISSUES

Appellant contends numerous reversible errors were committed in the (I) jury selection, (II) guilt and (III) sentencing phases of his trial.

1. JURY SELECTION

First, Appellant contends the trial judge erred in refusing his motion to quash the jury venire. We disagree.

[1] Appellant argues that S.C.Code Ann. § 14-7-850 (1976 & Supp.1983), in providing optional jury service to practicing physicians, lawyers, men and women over 65 and others, systematically excludes certain categories. Specifically, he contends that input from physician-jurors would contribute to the solution of medical and scientific issues before the jury.

The exception is without merit. The statute does not exclude or disqualify any category of citizens. Rather, it grants an option which the juror alone may exercise. *State v. Graham*, 79 S.C. 116, 60 S.E. 131 (1908).

There was no systematic exclusion of jurors.

Next, Appellant contends the excusal for cause of two jurors was improper. We disagree.

[2] Juror Madelyn Jane Antil (Antil) was under voir dire examination when the Court recessed for lunch. During the lunch hour she went to the trial judge's chambers and advised him that she was nervous because of her awareness of Appellant's prior convictions. The judge then brought in Antil's mother who advised him of her daughter's serious medical problems.

After recess the judge announced his excusal of Antil for cause. When Appellant's counsel objected, the judge gave a detailed explanation for his ruling. He stated that, commencing on the previous day, he had observed Antil closely. She appeared to be in somewhat of a stupor, her speech was slurred, her eyes fluttered and were closed during part of her testimony. She was extremely nervous and had difficulty answering questions.

From these observations and what he had learned at chambers, the judge concluded Antil was not competent to serve and stated:

> I have a duty to this defendant to assure him of a fair and impartial jury. I feel it would be to the best interest of the defendant that this juror be excused.

The actions of the trial judge were both correct and proper. "It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair and impartial," *State v. Holland*, 261 S.C. 488, 495, 201 S.E.2d 118 (1973), and "[t]he method and scope of *voir dire* is within the trial court's discretion." *State v. Thompson*, 278 S.C. 1, 10, 292 S.E.2d 581 (1982), cert. den. 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458.

[3] The second juror, Carolyn W. Livingston (Livingston), was excused by the Court on the ground of her opposition to the death penalty. Appellant contends her excusal was in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). We disagree.

Although in an isolated portion of her testimony she appeared to agree that under certain circumstances she could agree to the death penalty, Livingston stated categorically that she could not vote to impose the death penalty:

> Q. To boil it down to just one question. Based on your views of life, all that you feel, your upbringing and everything, could you really *in any case* sign your name on a piece of paper to put somebody in the electric chair? *Could you? Anybody?* (Emphasis supplied).
>
> A. No, I don't. No, because I don't want to live with it.

As in *State v. Plath*, 281 S.C. 1, 6, 313 S.E.2d 619 (1984), we find "[this response] fully warranted disqualification of the juror."

"The entire colloquy in voir dire, and not isolated portions, determines the qualifications of jurors to serve." *State v. Truesdale*, S.C., — S.E.2d — (1984).

II. GUILT PHASE

[4] Appellant contends that during jury deliberation of the guilt phase, an alleged ex parte communication between the trial judge and Brian Gibbes, a state's attorney, entitled Appellant to a mistrial. We disagree.

From the record it is clear that the incident complained of was not a communication within the definition and application of the term "ex parte."

According to the testimony, Mr. Gibbes, while at chambers and in the presence of the trial judge's law clerk, was requested by the judge to submit authority on a point

of law. At that moment Appellant's counsel, Mr. Dusenbury, entered. He contends Mr. Gibbes was pointing to underlying sections of some opinions which constituted an ex parte communication and grounds for mistrial.

The trial judge's explanation of what occurred is set forth in this colloquy:

> *The Court:* ... Mr. Dusenbury, what happened is, at the close of court on Friday he (Mr. Gibbes) came into chambers. I said, 'If you have any authority on that particular proposition, please submit it to me so I can study it.'
>
> Before I had a chance to send for you to ask likewise, you walked in and I told you if you had any authority to please present it in order to give me a chance to do some studying over the weekend, which I did. (Parenthesis supplied).

Appellant's contention that the alleged ex parte conference improperly influenced the trial judge's later ruling in the sentencing phase on admissibility of certain evidence is conjecture.

While ex parte communications are grossly improper and must be dealt with accordingly, there is no evidence here of any substantive discussion of Appellant's trial, only a request by the Court for legal authorities on points of law.

III. SENTENCING PHASE

First, Appellant contends error was committed in the admission of details of other crimes, and of evidence in aggravation not delineated in the death penalty statute. Specifically, he argues that details incident to Appellant's rape of State's witness, Sue Stuckey, were inadmissible. We disagree.

The initial disclosure of Appellant's rape of Stuckey occurred during his counsel's opening statement. As a trial strategy, counsel informed the jury that Appellant had been convicted of three sexual crimes, including the rape of Stuckey.

In the guilt phase Appellant conceded that conviction for rape of Stuckey was admissible under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). His objection is confined to the details of her rape testified to by Stuckey in the sentencing phase.

[5] In the sentencing phase of a capital case it is essential that the jury have for consideration all pertinent information about the defendant on trial for his life. *Barefoot v. Estelle*, 463 U.S. 880, ——, 103 S.Ct. 3383, 3396, 77 L.Ed. 1090, 1107 (1983), cited in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984).

"What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929, 941 (1976).

[6] Appellant's contention that, in the sentencing phase, evidence of non-statutory aggravating circumstances is inadmissible is refuted by numerous decisions of this Court, the United States Supreme Court and courts of other jurisdictions. *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jurek v. Texas*, *supra*; *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), cert. den. 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329; *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), app. after rem. Davis' Advance Sheets, Op. No. 22075, S.C., — S.E.2d ——, Filed April 3, 1984; *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981), app. after rem. 281 S.C. 1, 313 S.E.2d 619 (1984); *Barfield v. Harris*, 719 F.2d 58 (4th Cir.1984).

[7] Here, the trial judge ruled that circumstances of prior offenses were admissible only in reference to characteristics of Appellant. Evidence of such circumstances was properly admitted.

Next, Appellant charges error in refusal of the trial judge to permit testimony of Appellant's adjustment to prison life. We disagree.

[8] The trial judge properly refused to admit evidence of Appellant's *future* adapt-

ability to prison life. *State v. Koon, supra.* However, evidence of his past adaptability was admitted through testimony of his former wife, his mother and his own testimony. This contention is without merit.

Appellant next contends that the Solicitor's final argument was an appeal to the passion and prejudice of the jury. We disagree.

[9] The propriety of jury argument rests in the sound discretion of the trial judge and, absent an abuse amounting to an error of law, will not be disturbed. *State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975); *State v. Pitts*, 256 S.C. 420, 182 S.E.2d 738 (1971).

[10] We find from a review of the record, that the portions of the Solicitor's argument complained of do not constitute error when applied to the decisions of our Court.

Finally, Appellant, citing *State v. Stewart*, S.C., 320 S.E.2d 447 (1984), contends the trial judge erred in failing to give a jury instruction that details of prior convictions could only be considered as evidence of his characteristics, and could not be used as proof of the statutory aggravating circumstance of rape. We disagree.

In *Stewart* we held under the facts of that case that such a limiting instruction must be given. However, our holding was not intended to require the instruction where, as here, the statutory aggravating circumstance relied upon by the State in the sentencing phase has been proven beyond a reasonable doubt in the guilt phase.

[11] This case is distinguishable from *Stewart*. The test to be applied is whether failure to give the charge is prejudicial to the defendant. Where, as here, the State's alleged statutory aggravating circumstance has been established in the guilt phase by Appellant's conviction of rape, no prejudice resulted to him from failure to give the limiting charge to the jury in the sentencing phase.

Indeed, in the sentencing phase the State introduced no evidence of the crime of rape additional to that in the guilt phase, relying wholly upon the Court's granting of its motion "to introduce into the punishment phase of this trial all evidence previously admitted into the guilt phase of the trial."

[12] Accordingly, we hold that where the defendant has not been convicted in the guilt phase of the crime relied upon by the State as the statutory aggravating circumstance, the limiting instruction must be given when the State introduces evidence of details of prior acts or crimes. In those cases the jury must be charged that such evidence can be considered only as to the defendant's characteristics, and not as proof of the alleged statutory aggravating circumstance.

Appellant's reliance upon *Stewart* is misplaced.

PROPORTIONALITY REVIEW

[13] Pursuant to § 16-3-25(C)(3), we have reviewed the other death penalty cases in this State on the question of proportionality. *State v. Shaw and Roach*, 273 S.C. 194, 255 S.E.2d 799 (1979).

We find the sentence is not excessive or disproportionate to that imposed in similar cases. The death penalty is fully justified by the evidence of this case.

AFFIRMED.

LITTLEJOHN, C.J., and NESS, GREGORY and HARWELL, JJ., concur.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

April 3, 1985

Richard G. Dusenbury, Esquire
P. O. Box 555
Florence, South Carolina 29501

Re: The State v. Ronald DeRay Skipper

Dear Mr. Dusenbury:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition Denied.

s/ Bruce Littlejohn	C.J.
s/ J. B. Ness	A.J.
s/ George T. Gregory, Jr.	A.J.
s/ David W. Harwell	A.J.
s/ A. Lee Chandler	A.J.

April 3, 1985."

This is to confirm your telephone conversation this date with Donna Johnson, of my staff, in which you advised that you would file a Petition for Stay of Execution in this office no later than Friday, April 5, 1985.

Sincerely yours,

CLERK

CND,Jr./drj

cc: The Honorable Charles H. Richardson
Assistant Attorney General
P. O. Box 11549
Columbia, South Carolina 29211

S. C. Office of Appellate Defense
1122 Lady Street, Suite 301
Columbia, South Carolina 29201

The Supreme Court of South Carolina

The State,

Respondent,

v.

Ronald DeRay Skipper,

Appellant.

O R D E R

Petition for Stay of Mandate Pending Certiorari filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

FOR THE COURT C.J.

Columbia, South Carolina

April 9, 1985

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-6859

RONALD DERAY SKIPPER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 1985, one copy of the Petitioner's Reply to Respondent's Brief in Opposition was mailed, postage prepaid, to the below named counsel for the Respondent. I further certify that all parties required to be served have been so served.

Harold M. Coombs, Jr., Esquire
Office of the Attorney General
State of South Carolina
P. O. Box 11549
Columbia, S. C. 29211

David I. Bruck

DAVID I. BRUCK
Attorney for Appellant

1711 Pickens Street
Columbia, SC 29201
(803) 779-8080

Sworn to and subscribed before
me this 17th day of June, 1985.

Catherine A. Gulley (L.S.)
Notary Public for South Carolina
My Commission Expires: 6/18/91.